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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 982

COUNTY OF LOS ANGELES, PHILIP E. WATSON, COUNTY ASSESSOR, AND HAROLD OSTLY, TAX COLLECTOR,
Petitioners,

v.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division One, which reversed the judgment of the Superior Court of Los Angeles County, wherein the Superior Court held that Article I, Section 10, Clause 2 of the Constitution of the United States did not exempt the commodity involved herein from California's nondiscriminatory property tax.

OPINIONS BELOW

The opinion of the Superior Court is not reported; it is in the form of Findings of Fact and Conclusions of Law and is printed as Appendix A, *infra*.

The opinion of the District Court of Appeal is reported in 243 A.C.A. 304, 52 Ca. R. 209. The modification of the opinion and denial of the petition for rehearing is reported in 243 A.C.A. 752. The opinion, modification and denial are printed as Appendix B, *infra*.

The Petition For Hearing filed by the County of Los Angeles, et al., in the Supreme Court of the State of California was denied. Chief Justice Traynor is of the opinion that the petition should have been granted. The denial is reported in the Minutes of that Court for August 22, 1966, in 65 A.C., Minutes p. 2. The denial is printed as Appendix C, *infra*.

JURISDICTION

Review is sought of the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division One, in Civil No. 29779. The judgment was entered June 30, 1966. On July 28, 1966, the District Court of Appeal denied a petition for rehearing, but modified its opinion.

A Petition For Hearing was denied by the Supreme Court of the State of California on August 22, 1966. The Remittitur of the judgment of the District Court of Appeal to the Superior Court is dated August 30, 1966, and is printed as Appendix D, *infra*.

By order dated November 25, 1966, the Supreme Court of the United States granted an extension of

time to file a petition for writ of certiorari in the above entitled cause to and including January 19, 1967.

The Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S. C.A. § 1257(3) is believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari, because the judgment is that the levy of California's nondiscriminatory property tax on a commodity in the possession of an affiliate of Montrose Chemical Corporation of California, Respondent, was repugnant to Art. I, § 10, Cl. 2 of the Constitution of the United States.

QUESTION PRESENTED

When a chemical product cannot be sold at a profit in the United States, because of competition with less expensive products of a similar nature, is a nondiscriminatory California property tax levied thereon after the product has been manufactured under contracts for export and after it has been packaged especially for shipment on ocean vessels, but while it remains at the factory awaiting instructions from the purchasers as to when and to which port it should be shipped, laid on an *export* and, therefore, repugnant to Art. I, § 10, Cl. 2 of the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Art. I, § 10, Cl. 2:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, * * *"

Constitution of the State of California of 1879, as last amended November 3, 1964, Art. XIII, Revenue

and Taxation, § 1, Property To Be Taxed, p. 20, California Legislature Assembly, February, 1965:

> "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed according to its value, to be ascertained according to law, or as hereinafter provided. The word 'property', as used in this article and section, is hereby declared to include * * * * and all other matters and things, real, personal, and mixed, capable of private ownership * * *"; West's Annotated Codes, Constitution, Article XIII, § 1.

California Revenue and Taxation Code, § 405, Assessment Period:

> "Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. * * *" Stats. 1939, c. 154, p. 1286, § 405, as amended Stats. 1941, c. 1240, p. 3111 § 2; West's Annotated California Codes, Revenue and Taxation, § 405.

§ 5096. Refunds permissible: "On order of the board of supervisors, any taxes paid before or after delinquency shall be refunded if they were:

(a) * * * * *

(b) Erroneously or illegally collected.

(c) * * * * *

(d) * * * * *

(e) * * * * *" Stats. 1941, c. 664, p. 2114.

§ 5097. Conditions: "No order for a refund under this article shall be made except on a claim:

(a) Verified by the person who paid the tax * * *

(b) Filed within three years after making of the payment sought to be refunded." Stats. 1939, c. 154, p. 1370.

§ 5103. Court action authorized: "If the board of supervisors rejects a claim for refund in whole or in part, the person who paid the taxes, * * * may within six months after such rejection commence an action in the superior court against the county or a city to recover the taxes which the board of supervisors or the city council have refused to refund."

* * * * * * * * *

Stats. 1941, c. 664, p. 2115.

§ 5104. Claim for refund required: "No action shall be commenced or maintained under this article unless a claim for refund shall have been filed in compliance with the provisions of this article, and no recovery of taxes shall be allowed in any such action upon a ground not asserted in the claim for refund." Stats. 1941, c. 664, 2115.

STATEMENT OF THE CASE

Acting under a California statute,[1] on the first Mondays of March 1961 and 1962, the Petitioners levied property taxes on a chemical compound in the possession of Respondent's affiliate, Stauffer Chemical Com-

[1] Stats. 1939, c. 154, p. 1286; Revenue and Taxation Code, § 405, quoted above.

pany.[2] The taxes were paid by Respondent.[3] On December 27, 1962, Respondent filed verified claims for refunds, which asserted that each assessment in its entirety was void, on the ground that it violated Art. I, § 10, Cl. 2 of the Constitution of the United States. Said claims were rejected on February 11, 1964.[4] Within six months thereafter Respondent brought this suit in the Superior Court of Los Angeles County for refunds on the grounds specified in the claims.[5] The foregoing was accomplished in accordance with statutory prescription.[6]

The issue thus framed and restricted was submitted to the Superior Court on the pleadings and on an agreed statement of facts.[7] The stipulated facts material to consideration of the question presented are as follows:

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[2] Certified Record, Clerk's Transcript, pp. 2, 3, 9, paragraphs V and VI of First Cause of Action, First Amended Complaint, as admitted in par. III of Answer; and pp. 13-15, Pre-Trial Stipulation of Facts Agreed Upon and Issues. "Certified Record, Clerk's Transcript" hereinafter abbreviated as "C.T.". "Pre-Trial Stipulation of Facts Agreed and Issues" hereinafter referred to as "Stipulation".

[3] C.T. pp. 4, 6, 9, 10, par. XIII of First Cause of Action, First Amended Complaint, and par. VII of Second Cause of Action, as admitted in Answer, par. VI and Second Cause of Action, par. IV.

[4] C.T. pp. 4, 9, 10, par. XIV of First Cause of Action, First Amended Complaint, and par. I of Second Cause of Action, as admitted in Answer, par. VII and Second Cause of Action, par. I; and C.T. p. 16, Stipulation.

[5] C.T. pp. 1-7, First Amended Complaint.

[6] Stats. 1941, c. 664, pp. 2114, 2115; Stats. 1939, c. 154, p. 1370, Revenue and Taxation Code, §§ 5096, 5097, 5103 and 5104, quoted above.

[7] C.T. pp. 1-16, First Amended Complaint, Answer, Stipulation.

Prior to the tax lien dates in 1961 and 1962, Montrose Chemical Corporation of California contracted to sell to the United Nations International Children's Emergency Fund (UNICEF) and the General Services Administration (GSA) a chemical compound referred to as D.D.T. Concentrate. Said contracts required the Concentrate to be packaged in heavy fiber drums especially designed for shipment on ocean vessels to destinations outside of the territorial limits of the United States.[8] This Concentrate, as formulated and packaged in accordance with contract specifications, is not sold domestically,[9] because other less expensive Concentrates are available in the United States.[10]

Prior to said tax lien dates and pursuant to the aforementioned contracts, Montrose received from UNICEF and GSA purchase orders for specified amounts of the Concentrate.[11] The orders required Montrose to make delivery at its risk, "F.A.S. Vessel", that is, "free of expense to the" purchaser "along side overseas vessel and within reach of its loading tackle",[12] at designated ports, namely, New Orleans, Los Angeles, San Francisco, New York or Baltimore.[13] Final inspection and acceptance or rejection of the Concentrate could be made by the purchaser at the designated port.[14] The purchaser

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[8] C.T. p. 14, Stipulation.

[9] C.T. p. 15, Stipulation.

[10] C.T. pp. 88, 89, Exhibit N in evidence.

[11] C.T. p. 14, Stipulation.

[12] C.T. p. 37, Exhibit D in evidence.

[13] C.T. pp. 18, 20, Exhibit A in evidence.

[14] C.T. p. 42, Exhibit E in evidence.

was required to make payment for the Concentrate when presented with a "dock receipt".[15]

When Montrose received a purchase order, it manufactured one of the ingredients of the Concentrate and delivered it to Stauffer Chemical Company. Under contracts between Montrose and Stauffer, the latter Company was required to manufacture the Concentrate, package it for overseas shipment, and store it pending notification to deliver it to a designated port, all in accordance with the specifications in the contracts between Montrose and UNICEF or Montrose and GSA.[16]

The taxes here in dispute were levied upon the packaged Concentrate while it was stored at Stauffer's plant awaiting shipping instructions from the purchasers. Subsequently, all of the taxed Concentrate was transported to designated ports and shipped to foreign countries.[17]

The Superior Court concluded that inasmuch as the Concentrate had not entered the "export stream" on the tax lien dates, it "was not immune from taxation under Article I, Section 10, Clause 2 of the United States Constitution";[18] and on April 5, 1965, entered judgment that Montrose was not entitled to recover the taxes.[19]

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[15] C.T. p. 19, Exhibit A in evidence.

[16] C.T. pp. 14, 15, Stipulation; and C.T. 25, Exhibit C in evidence.

[17] C.T. p. 15, Stipulation.

[18] C.T. pp. 91-95, Findings of Fact and Conclusions of Law.

[19] C.T. pp. 96, 97, Judgment.

The Superior Court's judgment was appealed to the District Court of Appeal,[20] which reversed the judgment.[21] The federal question upon which review is sought here was raised in the District Court of Appeal in the "Preliminary Statement of the Case" set forth in Appellant's Opening Brief.[22] The District Court of Appeal relied upon *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, as authority for holding that articles need not have entered the export stream in order to become "Exports" within the meaning of Art. I, § 10, Cl. 2 of the Constitution of the United States; that the commencement of the process of exportation need not have occurred before "the certainty of a foreign destination is plain"; that the stipulated facts in the case at bar established such "certainty"; and, accordingly, that the Concentrate was exempt from taxation under the aforementioned constitutional provision.[23] In accordance with its Opinion, the District Court of Appeal entered judgment reversing the judgment of the Superior Court.[24]

REASONS FOR ALLOWANCE OF THE WRIT

In rendering the Opinion summarized immediately above, the District Court of Appeal decided a federal question of substance in a way that is not in accord with applicable decisions of this Court, particularly *Richfield Oil Corp.* v. *State Board of Equalization,*

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[20] C.T. p. 98, Notice of Appeal.

[21] Certified Record, Opinion of the District Court of Appeal.

[22] Certified Record, Appellant's Opening Brief, p. 1.

[23] Certified Record, Opinion of District Court of Appeal.

[24] Certified true copy of Remittitur submitted herewith, but not under cover of Certified Record.

supra, and *Empresa Siderurgica* v. *County of Merced,* 337 U.S. 154. The District Court of Appeal held that the constitutional exemption from taxation set forth in Art. I, § 10, Cl. 2 is not limited to exports, but even before the process of exportation has commenced it attaches to commodities subsequently exported, provided that on the tax date the evidence establishes plainly the intentions of the seller and purchaser to ship the commodities out of the country at some future date. In so holding, the District Court of Appeal has obliterated the point fixed by this Court—when "the export must be said to begin"—as the exact moment at which the tax exemption attaches; and has substituted a vague test for ascertaining immunity from taxation. If the judgment of the District Court of Appeal is allowed to stand, "the entrance of the articles into the export stream" will no longer be crucial in determining whether "there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use". *Something less will suffice!* The intentions of both seller and purchaser to export, as ascertained from the character of the goods, the recitations in the contract that the goods are to be manufactured for use only in foreign countries and packaged in a manner suitable for overseas shipment, etc., will become the new criterion for determining whether "there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use". It would be impossible for the tax authorities throughout the nation to apply such a vague test in a uniform manner.

Article I, Section 8 of the Constitution of the United States provides that, "The Congress shall have Power * * * to regulate Commerce * * * among the several

States * * *". In *Coe* v. *Errol,* 116 U.S. 517, the Court held that a State property tax did not operate to regulate commerce between the States and, therefore, did not infringe upon the authority of Congress to regulate interstate commerce, when the tax was levied upon logs that had been felled with the intent to ship them to another State, and that had been transported from the forest to a storage place from which they were to commence their final movement in transportation to the other State. In so holding the Court said:

> "* * * goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." p. 527

The above quoted test, fashioned to determine the validity under the Commerce Clause of the Constitution of a nondiscriminatory State tax, was applied subsequently in cases involving Art. I, § 9, Cl. 5 of the Constitution. e.g., *Turpin* v. *Burgess,* 117 U.S. 504; *Cornell* v. *Coyne,* 192 U.S. 418; *Spalding & Bros.* v. *Edwards,* 262 U.S. 66. Clause 5 prohibits Congress from laying any tax on "Articles exported from any State". *Turpin* and *Cornell* established that said constitutional provision is not infringed by a federal tax laid upon the manufacture of goods, even when the goods are manufactured pursuant to order of a foreign purchaser and are actually shipped abroad after the imposition of the tax. The basis of each decision was that the tax was imposed before the goods left the factory, when "They were not in the course of exportation * * *", and that the constitutional "exemption

attaches to the export and not to the article before its exportation".

On the other hand *Spalding* established that Art. I, § 9, Cl. 5 is violated by a federal tax on the sale of baseballs and bats, when under the terms of the sale title passed on delivery to the exporting carrier, whose vessel thereafter carried the balls and bats to the foreign purchaser. The Court held that "The overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell* v. *Coyne* * * *", and explained its selection of that point as the time after which the goods could no longer be taxed thusly:

> *"The question is whether the sale was a step in exportation,*[25] assuming as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands. * * * To answer it with regard to any transaction *we have to fix a point at which in view of the purpose of the Constitution, the export must be said to begin.* As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, *while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants.* * * * * On the other hand no one could doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, *and the export had begun."* pp. 68, 69

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[25] All emphasis in this Petition is counsels'.

In *Turpin* v. *Burgess, supra,* the Court stated that:

> "* * * the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, 'No tax or duty shall be laid on articles exported from any State', Art. I, Sec. 9, par. 5. In the other they are, 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. I, Sec. 10, par. 2". pp. 506, 507

Therefore, it was foreseeable that, when the occasion arose, the Court would hold that the test that determines whether a federal tax violates Art. I, § 9, Cl. 5 is equally applicable to cases arising under Art I, § 10, Cl. 2. The Court so held in *Richfield Oil Corp.* v. *State Board of Equalization, supra.* In that case Richfield Oil Corp. contracted to sell oil to the New Zealand Government for use in that country. The contract made the price F.O.B. Los Angeles and required delivery to the purchaser's tank steamer at Los Angeles, at which time title would pass from seller to buyer. The oil was carried by pipe line from the seller's refinery in California to seller's storage tanks at the harbor, and then pumped from the storage tanks into the purchaser's steamer. Richfield Oil Corp. paid under protest a California retail sales tax assessed against gross receipts from the transaction, and then brought suit to recover the tax on the ground that it was repugnant to Art. I, Sec. 10, Cl. 2. California opposed on the ground, *inter alia,* that *Spalding* stated a rule that the process of exportation does not start until delivery has been made to a common carrier. But, from the language of *Spalding*—"no one could doubt they [the balls and bats] were [exports and] exempt [from taxation] after they had been loaded

upon the vessel for Venezuela"—it was predictable that the Court would reject California's contention. The Court did so in the words that follow:

> "*The certainty* that the goods are headed to sea and that *the process of exportation has started* may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. * * * * * The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad.* * * * It would not be clearer that *the oil had started upon its export journey* had it been delivered to a common carier at an inland point". pp. 82, 83

In the light of the judicial construction given to Art. I, § 10, Cl. 2 by *Richfield,* it was beyond perspicacity that the District Court of Appeal would hold that that Clause exempts the commodity involved in the case at bar from California's property tax, and that the Supreme Court of the State of California would deny the Petition For Hearing filed by the taxing authority. Furthermore, it is incongruous that the District Court of Appeal based its decision upon the teachings of *Richfield Oil Corp.* v. *State Board of Equalization, supra.* It is incongruous because the Opinion of the District Court of Appeal states that:

> 1. California assesses all taxable personal property in its counties on the first Monday *in March.*
>
> 2. "The taxes herein were levied upon the packaged concentrate while it was at the Stauffer plant awaiting shipping instructions"..

3. The Stauffer plant is the factory where the concentrate was manufactured under contract for export.

4. "On the tax date the packaged concentrate was being held [at the factory] pending notification as to the ocean vessel to which it was to be delivered for export (and was thereafter delivered to a vessel and exported)".

5. The purchase order from UNICEF states, *"Delivery Required: May 1962"* and "names a person in Los Angeles from whom forwarding instructions will be received".

6. On the tax lien date the packaged concentrate "had not in any manner begun its physical movement to the harbor".

7. The purchase orders from GSA and UNICEF required the manufacturer to make delivery F.A.S. vessel, Los Angeles, or San Francisco or Richmond; that is, delivery "free of expense to the * * * [buyers], along side overseas vessel and within reach of its loading tackle". (Obviously, under those contractual terms, title to the concentrate would not pass while it remained at Stauffer's factory.)

The District Court of Appeal held that *Richfield* teaches that since "certainty of a foreign destination is plain", Art. I, Sec. 10, Cl. 2, exempts the Concentrate from taxation even though it has not started upon its export journey. The District Court of Appeal found "certainty of a foreign destination" from the fact that pursuant to the contracts the Concentrate had been packaged "in heavy fiber drums, especially designed for shipment on ocean vessels", and from the Stipulation that the Concentrate "is not saleable or sold domestically". But the District Court of Appeal

failed to take into account that the rationale of the cases cited above is that, insofar as Art. I, Sec. 10, Cl. 2 is concerned, there can be no "certainty of foreign destination" before the process of exportation has started.

The aforementioned rationale is stated with such clarity in *Empresa Siderurgica* v. *Merced County, supra,* that it is incredible that the District Court of Appeal failed to understand it, particularly since the salient facts of that case and the case at bar are identical. In *Empresa* the same California property tax was under attack, upon the ground that it had been laid upon an export and was, therefore, unconstitutional. The export was said to be part of a cement plant in Merced County that had been sold for export to South America. Even though title had passed, part of the plant had already been exported, possession of the remainder had been taken for the purchaser, and the entire plant eventually was exported, this Court sustained the validity of the tax, which had been levied only upon that part of the plant that had not been shipped out of the county on the tax lien date. That part included ten percent of the plant *"which had been dismantled and crated or prepared for shipment"*, but which had not been delivered to any carrier for export or otherwise started on its journey on the tax date. The Court said:

> "The tax immunity runs to the process of exportation and the transactions and documents embraced in it. * * * It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. *Nothing less will suffice".* pp. 156, 157

The modified opinion in the case at bar states that the D.D.T. Concentrate "under the stipulated facts, was not saleable in the domestic market". This stipulation referred to the fact that the Concentrate could not be sold domestically at a profit, because other less expensive Concentrates are available in the United States. But even if it is assumed, *arguendo,* that the Concentrate could not be sold domestically at less than the manufacturer's costs the fact remains that while the Concentrate remained at Stauffer's factory it had not entered the export stream.

In its original opinion the District Court of Appeal erroneously inferred from the Stipulation that the Concentrate "could not be *legally* sold in the domestic market". Even if it had been illegal to sell the Concentrate domestically, such additional fact would not have sufficed to establish the certainty of foreign destination required by *Empresa. Department of Revenue, Commonwealth of Kentucky* v. *Stitzel-Weller Distillery,* (Ky.) 387 S.W. 2d 603; cert. denied, 382 U.S. 846, relied upon *Empresa* in holding that Art. I, § 10, Cl. 2 did not exempt the manufacture of whiskey from State taxation, even when the whiskey was manufactured under a State permit requiring the whiskey to be placed in a U. S. Customs Bonded Warehouse for exportation to Mexico; and, accordingly, its sale domestically would have been illegal.

CONCLUSION.

For the reasons set forth above, this Court should grant the Petition For Writ of Certiorari, should reverse the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division One, and should reinstate the judgment of the Superior Court of Los Angeles County, California.

The certainty that the Concentrate had not yet become an export when taxed is so plain that the foregoing should be accomplished without oral argument. e.g. *Snyder, Administrator* v. *United States of America,* 350 U.S. 906.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

[Filed April 1, 1965]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. 818,260

MONTROSE CHEMICAL CORP., a Delaware Corporation,
Plaintiff,

v.

COUNTY OF LOS ANGELES, PHILIP E. WATSON and HAROLD J. OSTLY, *Defendants.*

Findings of Fact and Conclusions of Law

This cause came on regularly for trial before the Honorable William A. Munnell, in Department Southeast D, of the above-entitled court on February 3, 1965, the court sitting without a jury, a jury having been waived by the respective parties to the action. Anson, Gleaves and Larson, by John H. Larson appeared as attorneys for plaintiff; Harold W. Kennedy, County Counsel, by DeWitt W. Clinton, Deputy County Counsel, appeared as attorneys for defendants. A written Stipulation of Facts was filed by the parties and written Memorandum of Points and Authorities were submitted. The cause was submitted to the court for decision, and, after deliberation thereon, the court now makes the following:

FINDINGS OF FACT

I

The COUNTY OF LOS ANGELES is a political subdivision of the State of California.

II

PHILIP E. WATSON is the duly elected Assessor of the County of Los Angeles.

III

HAROLD J. OSTLY is the duly acting, qualified and appointed Tax Collector of the County of Los Angeles.

IV

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA is a corporation duly organized and existing by virtue of the laws of the State of Delaware, and authorized to, and doing business in the State of California.

V

That pursuant to Article XIII, Section 1 of the California Constitution and Section 405 of the Revenue and Taxation Code, the defendant, COUNTY OF LOS ANGELES, placed an ad valorem personal property assessment on a number of drums of DDT 75% Water Dispersible Powder owned by plaintiff on March 6, 1961, and located within the County of Los Angeles. That thereafter a tax was levied on this assessment in the sum of $11,261.83. This tax was paid under protest by plaintiff on August 30, 1961.

VI

That pursuant to Article XIII, Section 1 of the California Constitution and Section 405 of the Revenue and Taxation Code, the defendant, COUNTY OF LOS ANGELES, placed an ad valorem personal property assessment on a number of drums of DDT 75% Water Dispersible Powder owned by plaintiff on March 5, 1962, and located within the County of Los Angeles. That thereafter a tax was levied on this assessment in the sum of $12,563.83. This tax was paid under protest by plaintiff on August 30, 1962.

VII

Prior to the first Monday in March of the years 1961 and 1962, plaintiff contracted to sell to the United Nations

International Childrens Fund and the General Services Administration DDT 75% Water Dispersible Powder delivery to be F.A.S. vessel, Los Angeles, California.

DDT 75% Water Dispersible Powder (frequently referred to as "DDT Concentrate") consists of simple DDT (often referred to as "DDT Technical") combined according to certain contract specifications (see Exhibit L, M and N) with inert dilutants and conditioning agents described in the specifications. "DDT Concentrate" differs from "DDT Technical" in chemical formation and use. (see Exhibit N, page 2, paragraph 1) "DDT Technical" is salable on the domestic market whereas "DDT Concentrate" because of its particular chemical properties is not. (see Exhibit N, page 2, paragraphs 3 and 4.)

Prior to the first Monday in March of the years 1961 and 1962, plaintiff received purchase orders for "DDT Concentrate" pursuant to the contracts described above. Plaintiff thereupon contracted with the Stauffer Chemical Company to deliver "DDT Technical" (i.e. simple DDT manufactured by plaintiff) to Stauffer for conversion by Stauffer at its plant of "DDT Technical" into the product known as "DDT Concentrate". The contract between Stauffer and Montrose required Stauffer to package the "DDT Concentrate" according to certain contract specifications and to store it at the Stauffer plant in Los Angeles County pending notification from the contracting agencies to deliver it dockside. (Agreed Statement of Facts—Joint Pre-Trial Statement, pages 2-3).

The tax herein was levied upon the finished DDT 75% Water Dispersible Powder, i.e. "DDT Concentrate" which had been converted, prepared and packaged by Stauffer and was separately stored at its plant. The "DDT Concentrate" on the tax lien date had not been delivered to any dock or warehouse at Los Angeles Harbor, nor had it been delivered to any common carrier for transportation to

the harbor, nor had it in any manner begun its physical movement to the harbor on the lien date.

Based on the foregoing Findings of Fact, the Court makes the following;

Conclusions of Law

I

The DDT 75% Water Dispersible Powder, that i.e. "DDT Concentrate" taxed herein for the year 1961 had not on March 6, 1961, entered the "export stream" and was not immune from taxation under Article I, Section 10, Clause 2 of the United States Constitution.

II

The DDT 75% Water Dispersible Powder, i.e. "DDT Concentrate" taxed herein for the year 1962 had not on March 5, 1962, entered the "export stream" and was not immune from taxation under Article I, Section 10, Clause 2 of the United States Constitution.

III

The "DDT Concentrate" owned by plaintiff on March 6, 1961, was validly subjected by the County of Los Angeles to a nondiscriminatory ad valorem property tax.

IV

The "DDT Concentrate" owned by plaintiff on March 5, 1962, was validly subjected by the County of Los Angeles to a nondiscriminatory ad valorem property tax.

V

The taxability of the "DDT Concentrate" taxed herein for the years 1961 and 1962, was not litigated by the parties hereto in Los Angeles Superior Court Case No. 757,461.

VI

Plaintiff is entitled to recover nothing from defendants herein.

VII

Defendants are entitled to their costs herein.

Let Judgment be entered accordingly.

DATED this day of April 1, 1965.

WM. A. MUNNELL
William A. Munnell
Judge of the Superior Court

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT DIVISION ONE

Civil No. 29779

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, a Delaware corporation, *Plaintiff and Appellant,*

v.

COUNTY OF LOS ANGELES; PHILIP E. WATSON, and HAROLD J. OSTLY, *Defendants and Respondents.*

Filed June 30, 1966, Dist. Court of Appeal-Second Dist., J. T. Alley, Clerk.

Appeal from a judgment of the Superior Court of Los Angeles County. William A. Munnell, Judge. Reversed.

Anson, Gleaves & Larson, and John H. Larson, for Plaintiff and Appellant.

Harold W. Kennedy, County Counsel, and DeWitt W. Clinton, Deputy Counsel, for Defendants and Respondents.

This is an action to recover taxes which plaintiff paid to respondent county under protest. The taxes were levied

by the respondents on certain chemical products which plaintiff contends are exempt from taxation, under the federal Constitution, as exports. The court concluded that the products had not entered the "export stream" and were not exempt from taxation. Plaintiff appeals from the judgment that it take nothing by its action.

Appellant contends that the products are exempt from taxation under article 1, section 10, clause 2, of the United States Constitution which provides that "No State shall . . . lay any Imports or Duties on . . . Exports . . ."[1]

The matter was submitted on the pleadings and a written stipulation of facts.

Plaintiff manufactures a chemical product referred to as "D.D.T. Technical," which is used in the preparation of another chemical product referred to as "D.D.T. Concentrate." By reason of its chemical properties, D.D.T. Concentrate cannot be sold in the domestic market (United States). Prior to the first Monday in March of the years 1961 and 1962, plaintiff contracted with the General Services Administration (G.S.A.) and the United Nations International Children's Fund (UNICEF) for the preparation, packaging, and delivery "F.A.S. vessel,[2] Los Angeles, Cali-

[1] Article XIII, Section 1, of the California Constitution provides that "All property in the state . . . not exempt under the laws of the United States shall be taxed in proportion to its value . . ." Section 405 of the Revenue and Taxation Code provides: "Annually, the assessor shall assess all the taxable property in his county . . ."

[2] Defined in the G.S.A. specifications as "Delivered, free of expense to the Government, alongside overseas vessel and within reach of its loading tackle." The court found that the contract was for delivery "F.S.A. vessel, Los Angeles, California." The purchase orders from G.S.A. and UNICEF refer to delivery F.S.A. vessel, Los Angeles or San Francisco (or Richmond). The UNICEF purchase order states, in bold type, "Delivery Required: May 1962." That order also names a person in Los Angeles from whom forwarding instructions will be received.

fornia," of D.D.T. Concentrate for shipments outside of the territorial limits of the United States.

Also prior to the first Monday in March of said years, and pursuant to the contract, plaintiff received purchase orders to prepare certain quantities of D.D.T. Concentrate, which plaintiff prepared in the following manner: Plaintiff manufactured D.D.T. Technical and delivered it to Stauffer Chemical Company. Stauffer then prepared and packaged D.D.T Concentrate (utilizing the D.D.T. Technical) in heavy fiber drums, especially designed for shipment on ocean vessels, as specified in the contract. The drums of concentrate then "remained at the Stauffer plant pending notification from the contracting agencies to deliver the product dockside."

The taxes herein were levied upon the packaged concentrate while it was at the Stauffer plant awaiting shipment instructions. Although it was stipulated that "All of said materials so stored were subsequently transported to the docks and shipped to foreign countries," the record does not show whether the contracting agencies had given the shipping instructions to plaintiff or Stauffer prior to the tax lien date.

Among other things, the court found that on the tax lien date the packaged concentrate had not been delivered to any dock or warehouse at Los Angeles Harbor, had not been delivered to any common carrier for transportation to the harbor, and had not "in any manner begun its physical movement to the harbor."

As previously stated, appellant contends that the packaged D.D.T. Concentrate at the Stauffer plant was exempt from taxation under article 1, section 10, clause 2, of the United States Constitution.

In *Hugo Neu Corp.* v. *County of Los Angeles*,[3] .... Cal. App. 2d .... [.... Cal. Rptr. ....], the plaintiff

[3] Advance Report Citation: 241 A.C.A. 859, 51 Ca. R. 916.

sought to recover taxes paid under protest to defendant county. Plaintiff, pursuant to a "long range agreement" to sell scrap iron to several Japanese corporations, had purchased several tons of scrap iron and had shipped it to plaintiff's storage depot on Terminal Island. It was stipulated, among other things, that there was a domestic market for the scrap iron; the scrap iron unsegregated from plaintiff's other unsold scrap iron at the storage depot; there was no binding contract to sell the scrap iron to the foreign firms; and, as of the tax lien date, there was no order from the foreign firms to purchase any of the scrap iron. The trial court found that on the tax lien date the scrap iron was at Terminal Island awaiting sale; the scrap iron had not been invoiced to, or paid for by any purchaser, nor allocated to a particular shipment, nor consigned, nor sold to a particular buyer; "a strong probability of export existed" (the scrap iron was shipped to Japan a few weeks after the tax lien date); "but there had been no commitment to a particular purchaser, and no delivery for export had taken place either to a common carrier or to a buyer's agent." On appeal from the trial court's judgment that plaintiff was not entitled to recover the taxes paid under protest, appellant contended that the scrap iron was exempt from taxation under article 1, section 10, clause 2, of the United States Constitution. In affirming the judgment the court emphasized that there was a domestic market for, and no definite plan for export of, the scrap iron, and said (at pp. 864-865 [citing many of the cases[4] relied upon by the parties in the present case]):

---

[4] *Empresa Siderurgica, S.A.* v. *County of Merced* (1949), 337 U.S. 154 [69 S. Ct. 995, 93 L. Ed. 1276], affirming 32 Cal. 2d 68 [194 P. 2d 527, 11 A.L.R. 2d 934]; *Joy Oil Co.* v. *State Tax Com.* (1949), 337 U.S. 286 [69 S. Ct. 1075, 93 L. Ed. 1366]; *Richfield Oil Corp.* v. *State Board of Equalization* (1946), 329 U.S. 69 [67 S. Ct. 156, 91 L. Ed. 80]; *Coe* v. *Errol* (1886), 116 U.S. 517 [6 S. Ct. 475, 29 L. Ed. 715]; *Von Hamm-Young Co.* v. *City & County of San Francisco* (1947), 29 Cal. 2d 798 [178 P. 2d 745, 171 A.L.R. 274].

"[T]he test for immunity from local taxation is 'the certainty that the goods have been committed to a movement outside the state and will not be diverted into channels of local trade.' . . . 'It is the entrance of the articles into the export stream that marks the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.' [Citation.] Normally, goods are immune when they are shipped or entered with a common carrier for transportation to export or started on their journey. [Citations.] However, if the certainty of a foreign destination is plain, levying a tax is improper even though there is no delivery to a common carrier. (See *Richfield Oil Corp.* v. *State Board of Equalization* (1946) 329 U.S. 69 [67 S. Ct. 156, 91 L.Ed. 80], where delivery was made not to a common carrier but to the hold of the purchaser's vessel from the vendor's tanks located at the docks.) However, the interior movement of property, destined for ultimate removal to another country, which is preliminary or preparatory in character, does not constitute such movement as to confer immunity. [Citation.] Intent to make goods an export is not enough to make those goods immune from taxation [citation], and actual subsequent export of goods is not determinative as to their taxability as the tax lien date. [Citation.]"

In the present case, the facts are distinguishable from the facts in the *Hugo Neu* case in that here the D.D.T. Concentrate, pursuant to specific purchase orders from a particular purchaser, had been prepared and packaged especially for ocean transport, and, under stipulated facts, could not be legally sold in the domestic market. On the tax date the packaged concentrate was being held pending notification as to the ocean vessel to which it was to be delivered for export (and was thereafter delivered to a vessel and exported).

Applying the tests discussed in the *Hugo Neu* case to the facts in the present case, it was certain that the D.D.T.

Concentrate, which could not be sold in the United States and which had been especially packaged for overseas shipment to a particular purchaser, was committed to a foreign destination and could not be diverted to domestic use. As stated in those tests, "if the certainty of a foreign destination is plain, levying a tax is improper even though there is no delivery to a common carrier." The packaged concentrate was therefore exempt from taxation under the provisions of article 1, section 10, clause 2, of the United States Constitution.

The judgment is reversed.

WOOD, P. J.

We concur:

FOURT, J.

LILLIE, J.

Reported at 243 A.C.A. 304.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT DIVISION ONE

Civil No. 29779

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, a Delaware corporation, *Plaintiff and Appellant,*

v.

COUNTY OF LOS ANGELES; PHILIP E. WATSON, and HAROLD J. OSTLY, *Defendants and Respondents.*

Modification of Opinion; and Order Denying Petition for Rehearing

THE COURT:

The opinion filed herein on June 30, 1966, is modified by striking from third paragraph from the end of the opinion the words "could not be legally sold" and by inserting in place thereof the words "was not saleable." As modified that portion of the opinion should read: ". . . under the stipulated facts, was not saleable in the domestic market."

The petition for rehearing is denied.

APPENDIX C.

Order Denying Hearing After Judgment by District Court of Appeal, 2nd District, Division 1, Civil No. 29779

(Filed Aug. 24, 1966)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA

v.

COUNTY OF LOS ANGELES ET AL.

Respondents' petition for hearing DENIED.

TRAYNOR, C. J., is of the opinion that the petition should be granted.

TRAYNOR
Chief Justice

APPENDIX D

DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

Entered September 15, 1966, Book 5298, Page 135, by A. I. MAIORCA, *Deputy.*

No. 29779

S.C. No. 818 260

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, ETC.,
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES, ET AL.,
Defendants and Respondents

Remittitur

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES

The above entitled cause having been fully argued, submitted and taken under advisement,

IT IS ORDERED, ADJUDGED AND DECREED *by the Court that* the judgment is reversed. Costs to appellant.

No. 982

FEB 13 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

COUNTY OF LOS ANGELES, PHILIP E. WATSON, COUNTY ASSESSOR, and HAROLD OSTLY, TAX COLLECTOR,

Petitioners,

vs.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

Brief of Amicus Curiae State of California in Support of Petition for Writ of Certiorari

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No. 982

In the Supreme Court of the United States

OCTOBER TERM, 1966

COUNTY OF LOS ANGELES, PHILIP E. WATSON, COUNTY ASSESSOR, and HAROLD OSTLY, TAX COLLECTOR,

Petitioners,

vs.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

Brief of Amicus Curiae State of California in Support of Petition for Writ of Certiorari

The State of California hereby urges this Court to grant the Petition for Writ of Certiorari filed on behalf of the County of Los Angeles.

INTEREST OF AMICUS CURIAE

The State of California has filed this brief in support of petitioners for the reason that, if not corrected, the decision of the California District Court of Appeal could have significant effects on the revenues of this State and the political subdivisions thereof.

Though this decision involves a county *ad valorem* property tax, it might adversely affect the State of California's largest revenue source, it sales and use tax. The sales tax is a privilege tax of general application imposed on all retailers in the State of California, measured by the gross receipts from their sales of tangible personal property (California Revenue and Taxation Code, section 6051). The revenues produced by both state and local sales taxes could be seriously affected by the decision of the District Court of Appeal, which broadens the scope of the tax immunity granted by the Export Clause to an extent never before recognized by this or any other Court. In addition the *ad valorem* property tax revenues of the various political subdivisions of the State would suffer an unwarranted reduction.

ARGUMENT

The Decision of the California District Court of Appeal Is in Direct Conflict with Prior Decisions of This Court

The decision of the California District Court of Appeal is in direct conflict with the decision of this Court in *Empresa Siderurgica v. County of Merced,* 337 U.S. 154 (1948), which upheld an *ad valorem* property tax imposed by a county of this State in a situation similar to the present case.

The *Empresa* case involved a cement plant which had been sold to a foreign corporation for export to South America. By the tax lien date, the sale and shipment of the plant had progressed to the following point:

—an export license had been obtained

—a letter of credit in favor of the seller had been deposited here

—title and possession had passed to the purchaser

—a company, which was a common carrier, was employed to do the dismantling and packaging for shipment

—12% of the plant had actually been shipped
—10% had been dismantled and prepared for shipment
—34% had been dismantled but not prepared for shipment
—44% had not yet been dismantled

Under the same statutory authority involved in this litigation, the county levied an *ad valorem* property tax upon all the portions of the plant still in the county, i.e., on all but the 12% already shipped. This Court upheld the tax, holding that the property, *including the 10% that was packed and awaiting shipment,* had not yet begun the "process of exportation."

It is readily apparent that the property involved in the present litigation was not, on the tax lien date, nearly as close to entering the "export stream" as was the property involved in the *Empresa* case. For example, in *Empresa* title to the property had passed to the foreign purchaser and possession was taken for the purchaser, whereas, in the present case, the goods were still in the possession of the seller's agent. Neither title nor possession were to pass to the purchaser until the seller fulfilled his contractural obligation of delivering the goods to vessels designated by the purchaser. Thus we can conceive of no rationalization for holding that on the lien date the goods in this case were in the "export stream" whereas the property in the *Empresa* case was not.

The California District Court of Appeal did not discuss or attempt to distinguish the *Empresa* case. To the contrary, the California Court relied on the fact that the goods here involved were "not saleable" in this country. But "saleability" in this country is not, and should not be, the test used to determine when an item becomes an export.

The *Empresa* case itself discloses that the question of "saleability" is not relevant. Although not expressly stated in the opinion, it is evident that the various dismantled portions of the cement plant taxed in the *Empresa* case were not readily "saleable," especially since 12% of the plant was already out of the country.

Moreover, the "saleability" test would be completely unworkable. It would require, for instance, each county tax assessor to determine for each item of merchandise in his county whether the item is "saleable" in the domestic market. It is conceivable, then, that goods sitting in a seller's warehouse could be an export one year and not the next. This Court, in granting constitutional immunity only to those goods which have actually started the export process, has wisely avoided such irrational results. Furthermore, it is noteworthy that the California District Court of Appeal nowhere states what test is to be used to determine that an item is not "saleable" in this country. Must the assessor determine that there is no market whatsoever in this country for the product or is it enough to determine that the item could be sold more profitably abroad than domestically?

Because the decision of the California District Court of Appeal is so clearly contrary to the *Empresa* decision, we feel it would unduly lengthen this brief to discuss other decisions of this Court with which the California Court's decision is in conflict. Therefore, we simply cite, without discussion, the following decisions:

Coe v. Errol, 116 U.S. 517

Cornell v. Coyne, 192 U.S. 418

Diamond Match Co. v. Ontonagon, 188 U.S. 82

Joy Oil Co. v. State Tax Commission, 337 U.S. 286

CONCLUSION

Unless this Court intends to depart from its holding in *Empresa Siderurgica v. County of Merced, supra,* and the numerous other decisions with which it is in accord, the petition for certiorari in this case should be granted and the decision of the California District Court of Appeal reversed. In fact, the decision of the California District Court of Appeal is so clearly contrary to the *Empresa* decision that this case might properly be reversed, *per curiam,* without opinion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966
No. 982

COUNTY OF LOS ANGELES, PHILIP E. WATSON, COUNTY ASSESSOR, and HAROLD OSTLY, TAX COLLECTOR,

Petitioners,

vs.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

Respondent respectfully urges this Court to deny the petition for writ of certiorari filed on behalf of petitioners.

I.

Preliminary Statement.

Petitioners have in several particulars misstated both the facts and the application of the law by the courts of California. The "Question Presented" (Pet. p. 3) by the petitioners is quite erroneous and misleading. Since the case was submitted on a stipulation of facts, the extent of such error seems completely unjustifiable.

II.

The Facts.

Respondent manufactures a product referred to as D.D.T. Technical, which is used in the preparation of a product referred to as D.D.T. Concentrate. Concentrate is a special product manufactured to the detailed specifications of the World Health Organization. In addition to the D.D.T. Technical, it contains certain additional ingredients as surfacants and dispersants required in order to give the Concentrate properties needed for long storage periods and use under extreme climatic conditions. Special grinding is also required.

Respondent had contracted, prior to the tax years in question, for the sale of D.D.T. Concentrate to the General Services Administration of the United States Government and the United Nations International Children's Fund, an agency of the United Nations. Copies of the contracts in question, in the form of invitations to bid, are attached to the pre-trial stipulation on file herein, being those items referred to in the Clerk's Transcript pages 17, 28, and 48.

These contracts provided for the manufacture and packing of D.D.T. Concentrate for shipment to destinations out of the territorial limits of the United States. The contracts set forth detailed specifications with regard to the formulation and the testing, packaging, marking and handling of the Concentrate. These are set forth on pages 14, 18 and 72 to 87 of the Clerk's Transcript.

Prior to its manufacture and the first Monday in March in each taxable year, respondent received purchase orders pursuant to said contracts to prepare cer-

tain quantities of Concentrate [see purchase orders from both the General Services Administration and the United Nations Children's Fund, Clk. Tr. pp. 22, 41 and 65]. Upon receipt of the purchase orders, D.D.T. Technical was shipped by respondent from its plant to Stauffer Chemical Company's plant. Stauffer Chemical Company then formulated the Concentrate under contract with the respondent and packed it in the specially specified heavy fibre drums with steel tops and an interior packaging of hermetically saled polyethylene. The packaged material was then placed in separate storage in Stauffer's warehouse awaiting instructions from the United Nations Emergency Fund or the General Services Administration as to the ship to which delivery was to be made for transport to the foreign destinations. The destination country had already been designated in the purchase order. All of the material thus packaged was subsequently transported to the docks and shipped to the foreign countries named in those purchase orders.

Petitioners correctly state that such product is not *sold* domestically. Petitioners fail to state that such product is not *salable* domestically. This fact was stipulated by petitioners [Clk. Tr. p. 15, lines 4-6]:

> ". . . D.D.T. Concentrate prepared and packaged in such a manner is not salable or sold domestically."

Among other reasons, the absence of registration of this insecticidal formulation under applicable California or Federal laws would have made its sale in California or shipment in interstate commerce unlawful. Notwithstanding the petitioners' statement, at no time prior to the present petition was there any contention that the

reason that such product was not salable was that it could not be sold domestically at a profit. Such a statement on petitioners' part is a gross misrepresentation of the stipulated facts.

III.

Property Becomes an Export Within the Constitutional Provisions When Its Export Journey Commences. Both the Nature of the Product and the Certainty of Its Final Commitment to a Foreign Destination Are Important Factors in the Determination of the Issue.

The Constitutional provision has consistently been construed so as to afford liberal protection of exports against local taxation.

Richfield Oil Corp. v. State Board of Eq. (1946), 329 U.S. 69, 81 L. Ed. 80;

A. G. Spaulding & Bros. v. Edwards (1923), 262 U.S. 66, 67 L. Ed. 865;

Union Oil Company of California v. City of Los Angeles (1964), 227 Cal. App. 2d 608.

The most commonly applied test is that of delivery of the goods to a common carrier. The California Superior Court based its decision adverse to the appellant on the lack of such delivery. While the common carrier test is a readily applied one, that it is not to be slavishly followed has been clearly established since the decision of the *Richfield Oil Corp.* case, *supra.* There, delivery of oil, a common article of domestic commerce, was made into the purchaser's vessel in domestic wa-

ters. Finding this to be an export, the court stated (pp. 82-83, 91 L. Ed. 92-93):

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. . . ."

Thus we start with both the burden and the opportunity of showing that "same degree of certainty" on the facts present here. What then are these facts?

It is stipulated that a special material was manufactured to specific orders of the Government Agency specifying a product differing in chemical composition from any product sold or salable in the United States and packaged in containers used only in connection with exported material. The Government purchase orders, in addition, specified the foreign country which was the destination of the product. After manufacture, the material and packaging was inspected in the formulating plant and accepted by the purchasing agency. The material was then placed in separate storage in the Stauffer warehouse.

Respondent earnestly contends that at this point these goods are as irretrievably committed to the export process as they will ever be. Respondent had done everything in its power to advance the export process. It could do nothing more until it received notification from the Government Agency of the ship which would carry the material to the destination country. Not only was Montrose required by its contracts to deliver it for that purpose, but the nature of the product itself permitted no other use.

Once the D.D.T. Concentrate had been thus manufactured and packaged we earnestly contend that these goods are as much in the process of exportation during their short trip into the Stauffer warehouse as they are at any later stage of their transport.

Even in the usual case of movement of goods, of a kind both used domestically and abroad, by common carrier, the shipper has the power to issue a diversion order which could send the product to a domestic destination. The United States Supreme Court discussed this possibility in *A. G. Spaulding & Bros. v. Edwards, supra,* and dismissed it with the statement:

> "Theoretical possibilities may be left out of account." (p. 70.)

Even this theoretical possibility is absent here.

The California courts are not unaware of the distinctions and problems involved in export matters and of the constitutional provision under consideration. In *Gough Industries v. State Board of Equal.* (1959), 51 Cal. 2d 746, a California manufacturer of electrical equipment delivered goods to an export packer's plant. The latter packed and crated them and subsequently forwarded them by truck carrier to the ship. The issue was as to the taxability of the goods while in possession of the packer. There was no indication that the goods were different in character from other such equipment sold domestically. The court held that the goods were immune from tax and that (p. 749):

> ". . . (a) the agreement of sale contemplated shipment of the goods in export, that is, from a seller in the United States to a buyer in a foreign country; (b) from the beginning of the transaction, the

goods were committed to go all the way to the foreign country; (c) the movement of the goods had actually started when the tax was sought to be imposed; and (d) the journey was continuous and unbroken by any action or delay taken for a purpose independent of the transportation of the goods."

All of the tests of the *Gough* case can be met here, except that it can be argued that there was insufficient movement of the goods. Even this can be found in the shipment of the D.D.T. Technical from Montrose's plant to Stauffer for final formulating and packing (similar to the export packing in the *Gough* case) or in the movement of the packaged goods into the Stauffer warehouse. We contend, however, that where as here the goods are of such character that export is the only possibility, the movement test becomes of secondary importance.

In *Von Hamm-Young Co. v. San Francisco* (1947), 29 Cal. 2d 798, goods purchased in San Francisco and elsewhere were stored in a San Francisco warehouse awaiting availability of ships to carry them to Hawaii. As soon as cargo space became available the goods were shipped. The period of storage ranged from 18 days to 9 months. The court held that all of these goods were immune from local property tax.

Respondent had never sold the goods in question domestically, lacked authority to divert the goods (because of the terms of its export contracts) and was merely awaiting availability of transport to the foreign destination. While thus awaiting instructions from the purchasing agencies, it had "done everything possible to

deliver the goods to the common carrier for transportation to their final destination."

In *Philippine Ref. Co. v. Contra Costa* (1938), 24 Cal. App. 2d 665, the plaintiff imported coconut oil from outside the United States which was stored in tanks on plaintiff's property awaiting delivery to various buyers throughout the United States. The court cited Article I, Sections 8 and 10, of the United States Constitution, and analyzed several Federal cases. In holding them immune from tax the court put emphasis on the fact that the goods in question were not held in tanks for indiscriminate sale throughout the United States, and relied heavily on the United States Supreme Court case of *Carson Petroleum Co. v. Vial* (1929), 279 U.S. 95, 73 L. Ed. 626. In that case the company took orders from foreign buyers and then purchased oil in Kansas, Oklahoma, and Texas, and caused it to be transported to Louisiana. It was stored in the company's tanks while awaiting shipment by steamer to foreign buyers. The United States Supreme Court held it was not subject to taxation, pointing out:

> "There has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through."

A case requiring discussion is *Empresa Siderurgica, S.A. v. County of Merced* (1949), 337 U.S. 154, 93 L. Ed. 1276 (confirming, 32 Cal. 2d 68). In that case a California cement plant was sold to a foreign corpora-

tion for export to South America. On the tax date 12 percent of the plant had been shipped. The balance was taxed, which included 10 percent which had been dismantled and crated, 34 percent which had been dismantled but not crated, and 44 percent which had not been dismantled. Holding that the remaining portions of the plant "might still have been diverted into the domestic market", the Supreme Court finds the property subject to tax. Justice Frankfurter dissented, criticizing the mechanical disposition of such cases and pointing out that: "It is the degree of certainty * * * and not conformity to a prescribed ritual like delivery to a carrier that is significant." The degree of certainty present in our case is so high that the majority holding in the *Empresa* case can be readily distinguished.

The Appellate Court in 1955 in *Matson Nav. Co. v. State Bd. of Equal.* (1955), 136 Cal. App. 2d 577 (hearing denied by the California Supreme Court), commented on the *Empresa* case, stating (p. 584):

> ". . . the tax in question there was an ad valorem tax on the goods involved while there still was no sufficiently positive or certain or irrevocable commitment of those goods into the export stream. The transaction had not yet advanced the goods involved to a position where they were actually subject to dominion by a foreign country *nor were they in the ordinary course of events certain to so become.*" (Emphasis added.)

Although holding the property there involved was not an export, the court in *Eardley Fisheries Co. v. City of*

Seattle, 314 P. 2d 393 (Wash. 1957), indicated another conclusion would have reached had the property been of a nature that the only practical use would be for export. The court stated:

> "The charatcer of the commodity may also establish certainty that it will enter the stream of foreign commerce. Where for all practical purposes, the commodities could only be used abroad and could serve no domestic purpose, it could be said that the goods are irretrievably committed to export."

To summarize then, we have a case here where, pursuant to pre-existing contracts with the purchasers, goods are manufactured and packaged to the buyer's specifications, these goods being unsalable in the domestic market. The tax date arrived while some of these goods were in the Stauffer Chemical Company warehouse awaiting instructions from the buyer that a ship was available for their transport abroad. We submit that there was a greater certainty of completion of the export process in our case than in that of the oil pumped in the *Richfield* case tanks, the electrical products in the hands of the export packer in the *Gough Industries* case, or the warehoused goods in the *Von Hamm-Young* case. It would be a matter of form replacing substance to require movement of the D.D.T. Concentrate beyond the Stauffer warehouse as a prerequisite to finding these goods to be in the export stream.

In the words of Justice Fourt in *Union Oil Co. v. City of Los Angeles* (1964), 227 Cal. App. 2d 608, 614:

> "To state these transactions so formally conducted, of so obvious a character and so evidently in such complete good faith, were local sales in Los Angeles would be a purely arbitrary pronouncement.
>
> "This court has frequently made hairline distinctions to uphold a tax on interstate commerce and thereby prevent such commerce from escaping its fair proportion of the burden of taxation. No such difficulty presents itself here. Our research leads us to conclude that no court has attempted to whittle down the constitutional inhibition against a tax by either the federal government or the states without the consent of Congress upon imports and exports. That inhibition is unqualified (discriminatory or otherwise) and prohibits Congress from permitting a state to levy a tax upon an export except for the use and benefit of the United States Treasury.
>
> "In this case the contract for the sale of the oil contemplated its export to foreign lands and it was delivered to such lands."

With the degree of certainty here of the completion of the export process, it is submitted that these goods were exports as that term is used in the Constitution and therefore immune from local taxation.

Petitioners suggest that a recognition that circumstances other than delivery to a common carrier or the

purchaser will substitute a vague test for ascertaining immunity from taxation and will create problems of application for the tax authorities. Examination of the cases, however, discloses that determination of the issue of the time of commencement of the export process has not been a simple one. The key issue remains, however, certainty of foreign destination and non-diversion to domestic use. This test can be met in the present case. That the facts are highly unusual ones should not prejudice respondent's case.

Respectfully submitted,

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